Filed 11/10/09 In re D.W. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re D.W., a Person Coming Under the Juvenile Court Law.	B216226 (Los Angeles County Super. Ct. No. CK67075)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. C.C., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Donna Levin, Juvenile Court Referee. Affirmed.

Deborah Dentler, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the Los Angeles County Counsel, James M. Owens, Assistant County Counsel, and Navid Nakhjavani, Senior Associate County Counsel, for Plaintiff and Respondent.

INTRODUCTION

C.C. (Mother) appeals from an order denying her petition for modification (Welf. & Inst. Code,[1] § 388) and terminating her parental rights over her minor son, D.W. (§ 366.26). She claims the trial court failed to comply with the Indian Child Welfare Act (ICWA, 25 U.S.C. § 1901 et seq.). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

D.W. came to the attention of the Department of Children and Family Services (DCFS) in August 2006, when he was a year old. Mother had left him with the paternal grandmother, who had agreed to take care of him for a few days, and Mother then disappeared for three months. D.W.'s father, D.W. (Father),[2] had called the grandmother to check on D.W., but the grandmother had no means of contacting Father. The grandmother could not afford food and other necessities for D.W. and had sought public benefits.

Mother eventually reclaimed D.W., and DCFS instituted voluntary family maintenance services. These were unsuccessful due to continuing domestic violence between Mother and Father and Father's drug and alcohol abuse. DCFS filed a petition under section 300. The petition eventually was sustained under subdivision (b), failure to protect, based on the domestic violence and drug and alcohol abuse.

Over the next two years, reunification was attempted, but Mother and Father were unable to complete their reunification programs. Mother had difficulty maintaining a stable lifestyle, she failed to comply with court orders, she was inconsistent with visitation, and she was unable to solve the problems that led to the dependency proceedings.

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[1] Unless otherwise stated, all further section references are to the Welfare and Institutions Code.

[2] Father is not a party to this appeal.

Father was uninvolved in the proceedings for the majority of the time. He did not make his first appearance in the proceedings until August 15, 2008. At that time, he filled out an ICWA-020, parental notification of Indian status, stating that he "may" have Native American ancestry through his great grandmother.

On January 13, 2009, DCFS reported: "The father's Native American heritage is unknown. The DCFS has attempted to retrieve any information as to this matter; however neither the father nor paternal relatives have provided any information. Paternal grandmother was given the ICWA 1020, in hopes to establish any known or unknown heritage; however that paternal grandmother has not respon[ded] to the DCFS. The paternal grandmother stated to the DC[FS] that she was unsure as to an[y] Native American heritage and would speak [with] a 90-year old relative, however to date[,] no further information has been provided to the DCFS. Father has not stated that he has Native American heritage, however based on the conversations [with] paternal grandmother, neither father nor paternal grandmother are of a registered tribe. [¶] Given the above attempts and information, the DCFS respectfully requests that the court make a finding and/or ruling as to ICWA. The DCFS has no knowledge or belief that ICWA applies in this matter."

At the section 366.26 hearing, counsel for DCFS pointed out that the court had not made an ICWA finding. The court asked Father's counsel whether she agreed that Father never stated that he had an ICWA issue. She agreed, as did Mother's counsel. The court then found that neither parent had Native American heritage and ICWA did not apply.

DISCUSSION

Mother contends that the juvenile court erred in finding D.W. had no Native American heritage. Specifically, she claims there was no evidentiary basis for the finding because DCFS had an obligation to send notice of the proceedings to the Bureau of Indian Affairs.

We agree that the issue of compliance with ICWA was not waived by the failure to raise it below. (*Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 260-261; *In re Marinna J.* (2001) 90 Cal.App.4th 731, 737-739.) However, we do not agree that there was any prejudicial error.

"The ICWA protects the interests of Indian children and promotes the stability and security of Indian tribes and families. Minimum federal standards, both substantive and procedural, effectuating these policies are set forth in the ICWA." (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 469.) Under ICWA, it is presumed that "it is in the best interests of the child to retain tribal ties and cultural heritage and in the interest of the tribe to preserve its future generations, a most important resource." (*Ibid.*) Therefore, "[t]o ensure a tribe's right to intervene [in proceedings where an Indian child is involved], the ICWA requires 'where the court knows or has reason to know that an Indian child is involved,' the party seeking termination of parental rights must, in relevant part, notify the Indian child's tribe of the pending proceedings and its right to intervene." (*Ibid*.) This notice "enables the tribe to investigate and determine whether the minor is an Indian child" and gives the tribe the opportunity to intervene. (*Id*. at p. 470.) Failure to provide the necessary notice requires invalidation of actions taken in violation of the ICWA. (*Id*. at p. 472.)

The notice requirements are triggered when the court has reason to know that an Indian child is involved in the proceedings. (§ 224.3, subd. (c).) To comply with ICWA, the juvenile court has "an affirmative and continuing duty to inquire whether a child for whom a petition under Section 300 . . . is to be, or has been, filed is or may be an Indian child in all dependency proceedings . . . ." (§ 224.3, subd. (a); Cal. Rules of Court, rule 5.481(a).)

Under subdivision (b) of section 224.3, "The circumstances that may provide reason to know the child is an Indian child include, but are not limited to, the following: [¶] (1) A person having an interest in the child, including the child, an officer of the court, a tribe, an Indian organization, a public or private agency, or a member of the child's extended family provides information suggesting the child is a member of a tribe

or eligible for membership in a tribe or one or more of the child's biological parents, grandparents, or great-grandparents are or were a member of a tribe."

None of the circumstances listed in section 224.3, subdivision (b)(1), is present here. There was no information provided to DCFS that a member of Father's family was a member of a tribe or that D.W. was eligible for membership in a tribe. The only information provided was that Father *may* have Native American heritage through his great-grandmother. This was not enough. (*In re O.K.* (2003) 106 Cal.App.4th 152, 157.) "The information . . . that the father 'may have Indian in him' was not based on any known Indian ancestors . . . . This information was too vague and speculative to give the juvenile court any reason to believe" D.W. was an Indian child protected by ICWA. (*Ibid.*)

Mother relies on *Dwayne P. v. Superior Court*, *supra*, 103 Cal.App.4th 247 for the proposition that the "mere 'hint' of Indian ancestry [is] enough to trigger the notice requirement." *Dwayne P.* does note that "hint" is one of several synonyms for "suggest," a term used in federal rules implementing ICWA. (*Id.* at p. 258.) In *Dwayne P.*, however, the parents stated that they had Cherokee Indian heritage, although they were unsure as to whether ICWA applied. (*Id.* at pp. 257-258.) Father made no such claim of Native American heritage here.

Moreover, Mother has made no representation that, if DCFS were required to provide notice to the Bureau of Indian Affairs, it would have identified a tribe in which D.W. may have been eligible for membership and which may have sought to intervene in the proceedings. "Parents unable to reunify with their children have already caused the children serious harm; the rules do not permit them to cause additional unwarranted delay and hardship, without any showing whatsoever that the interests protected by the ICWA are implicated in any way. [¶] The burden on an appealing parent to make an affirmative representation of Indian heritage is de minimus. In the absence of such a representation, there can be no prejudice and no miscarriage of justice requiring reversal." (*In re Rebecca R.* (2006) 143 Cal.App.4th 1426, 1431; accord, *In re N.E.* (2008) 160 Cal.App.4th 766, 770.)

DISPOSITION

The order is affirmed.

JACKSON, J.

We concur:

PERLUSS, P. J.

ZELON, J.